85-1762

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARYLAND CUP CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Equal Employment Opportunity Commission have the authority to issue a subpoena to compel an employer to interview witnesses and compile their testimony, pursuant to Section 710 of Title VII of the Civil Rights Act of 1964 which in turn makes applicable Section 11 of the National Labor Relations Act?

2. If so, should such subpoenas be subject to the deferential standard of review generally applicable to administrative subpoenas for records or attendance of witnesses or should they be subject to the same review as interrogatories under Rule 33 of the Federal Rules of Civil Procedure?

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No.

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OCTOBER TERM, 1985

MARYLAND CUP CORPORATION,
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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Maryland Cup Corporation[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on February 28, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at ___ F.2d ___, 40 Fair Empl. Prac. Cas. (BNA) 475 (4th Cir. 1986) (Reprinted

[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Petitioner Maryland Cup Corporation advises the Court that it is a subsidiary of Fort Howard Paper Company.

herein as Appendix A). The United States District Court for the District of Maryland issued an oral opinion followed by a confirmation letter, both of which are not officially reported, and which are reprinted as Appendix B to this petition.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals entered in this case on February 28, 1986 is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals' jurisdiction over this case was invoked pursuant to 28 U.S.C. § 1291. The District Court has jurisdiction over this case pursuant to § 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9 and § 11 of the National Labor Relations Act, 29 U.S.C. § 161.

STATUTES AND RULES INVOLVED

1. § 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, Section 161 of Title 29 shall apply.

2. § 11 of the National Labor Relations Act, 29 U.S.C. § 161 (App. C).

3. Federal Rules of Civil Procedure, Rule 26(b)(1) (App. D).

4. Federal Rules of Civil Procedure, Rule 33 (App. E).

5. Federal Rules of Civil Procedure, Rule 45(b) (App. F).

STATEMENT OF THE CASE

On January 29, 1979, Commissioner J. Clay Smith of the Equal Employment Opportunity Commission (EEOC)

filed a charge of discrimination against Maryland Cup Corporation, alleging racial and sexual discrimination in recruitment, hiring, assignment, transfer, promotion, training and compensation at the Company's Maryland facilities.[2]

On March 1, 1982, the EEOC's District Director for the Baltimore District Office issued a subpoena, part of which is at issue in this Petition.[3] As modified upon administrative appeal, the subpoena directed that the Company identify by race over 5,000 former employees employed during the years 1976-1978.[4]

---

[2] On May 7, 1981, Commissioner Smith amended the charge to allege that the alleged unlawful employment practices commenced January 1, 1974. *See EEOC v. Shell Oil*, 466 U.S. 54, 104 S. Ct. 1621 (1984).

[3] A previous subpoena, issued by the District Director on March 8, 1979, was revoked July 15, 1981. The EEOC's administrative procedures governing subpoenas are set forth at 29 C.F.R. § 1601.16.

[4] The subpoena also sought computer tapes, payroll and personnel cardex files and other documents. The Company produced the computer tapes and many of the documents requested at its own expense. It also offered to make all other existing documents covered by the subpoena available for inspection and copying. The EEOC's General Counsel ruled, on administrative appeal, that the Company must bear the expense of all copying sought by the Commission. Before the District Court, the EEOC offered to copy the documents one box at a time at its own office. The District Court, however, ruled that the Company should not bear the copying expense and that the Company should not have to produce the documents at the EEOC's office because the risk of loss would force the Company to reproduce the records for self-protection. It directed that the documents remain available at the Company for inspection and copying at the EEOC's expense. The Court of Appeals held that the Company should be required to produce the records at the EEOC's office, but that the Company could assign an employee to accompany the documents while they were being copied. The Company does not seek Supreme Court review of that portion of the Court of Appeals' ruling.

On July 26, 1984, the EEOC filed its Application for Order to Show Cause pursuant to § 710 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9 which makes § 11 of the National Labor Relations Act (NLRA), 29 U.S.C. § 161, applicable to EEOC investigations. One of the issues before the District Court was the EEOC's demand for racial identification of former employees for 1976-1978. On this issue, the Company's uncontradicted affidavit showed that over 5,000 persons worked for and left the Company during the years 1976-1978. There is no existing document or record identifying these employees by race.[5] To identify these persons by race, the Company would first have to inspect photo identification badges which were retained for approximately 40 percent of the employees in question and attempt to classify the former employees as black or white. Because of deterioration of the badges this may not be possible in many instances. As to those persons whose race could not be determined by examination of a badge, either because no badge was retained or because a racial identification could not be made based on a retained badge, the Company's sole means of finding out the race of employees would be to interview the individuals' supervisors and co-workers. This would involve obtaining a computer printout of the names of the former employees giving their last departmental location, and matching the location with a particular supervisor. There are no organizational charts that would expedite this process, which means that each presently employed supervisor who

[5] During 1976-1978, the Company prepared and filed with the EEOC annual EEO-1 reports showing the racial make up of its work force by occupational groups, however, there was no requirement that the work sheets used to prepare these reports be retained until after the Commissioner's charge was filed in 1979. 29 C.F.R. § 1602.14. To the contrary, EEOC regulations discouraged employers from maintaining files identifying employees by race, out of concern the information would be used to discriminate. 29 C.F.R. § 1602.13.

was employed in 1976-1978 would have to be questioned in order to be matched with a department or departments. Once supervisors had been matched, to the extent possible, with departments, the supervisors would have to be questioned concerning the race of each former employee. If supervisors could not identify the race of an employee, the Company would have to question co-workers. Complicating this process would be that 15-20 percent of the supervisors employed in 1976-1978 are no longer employed. A further complication is that the Company's greatest turnover was among short term (less than 45 days) employees who are highly unlikely to be remembered by anyone. The Company's affidavit, which was uncontested by the EEOC, showed that the Company would not be able to identify many employees, and would have no basis for measuring the accuracy of its supervisors' and employees' recollections. The Company has provided to the EEOC computer tapes from which the necessary printouts can be obtained, and has made the photo identification badges available for inspection and copying by the EEOC.

The District Court denied the EEOC's application for an order directing compilation of race identification data for 1976-1978. The District Court found:

> As to the EEOC's demand that Maryland Cup perform a reconstruction of the racial identification of employees for the period between 1976 and 1978, I think this is a demand which need not be met by the company.
>
> It is not the obligation of one under investigation to call witnesses in and do the preparation of work product in connection with the statistical data which underlie the case.
>
> If this is as vital as EEOC feels it is, then it is appropriate for them to expend their time, effort and energy in developing that data. But again, it is

> certainly not an issue where I can find myself unduly sympathetic to the EEOC's position, when in large part, the unavailability of documented racial data in the prior years arises out of regulation and/or directives issued by the Commission itself or by local Commission which forbade the retention of documents which showed racial identification. If they had existed, they could have been supplied. But to now ask the company to call in not only current employees but employees who have departed the company in the past and to interview them concerning recollection of recall as to the racial and sexual makeup of the various segments of the company's operation is to impose on an investigated company an obligation to commit itself on very imprecise and very suspect data to a position which can then be used in opposition to the company's right to be heard and to defend itself. (App. B, pp. 17a-18a).

On appeal by the EEOC, the Court of Appeals reversed the District Court and held that the EEOC has authority to compel the Company to inspect the photo identification badges and interview supervisors and employees to ascertain the race of former employees. The Court of Appeals held that the EEOC's power to subpoena "any evidence," as provided in § 11 of the NLRA, 29 U.S.C. § 161, was broad enough to encompass the recollections of supervisors and employees. (App. A, pp. 10a-11a). The Court of Appeals further found that under the deferential standard of review generally applicable to administrative subpoenas, there was no basis for denying enforcement to the subpoena. (App. A, p. 4a). However, the Court ruled that the Company cannot be required to interview former supervisors or employees, but it can be required to turn over latest known addresses and telephone numbers. (App. A, p. 12a). The case was remanded to the District Court with instructions.

Maryland Cup filed its Motion for Stay of Mandate Pending Application for Certiorari on March 21, 1986. The Stay was granted on March 28, 1986.

REASONS FOR GRANTING THE WRIT

The Court of Appeals relied upon the EEOC's ability to subpoena "any evidence" as support for the proposition that the EEOC may, by means of a subpoena *duces tecum,* compel the compilation of data, even if the information is not contained in existing documents and can be obtained, if at all, only by questioning a large number of witnesses as to their recollections. Section 11 of the NLRA, 29 U.S.C. § 161. Under this interpretation of the statute, the concept of a subpoena is completely liberated from its traditional use as a device for obtaining existing documents or attendance and testimony of witnesses. The subpoena instead becomes a type of interrogatory, by which the agency can require its respondents to research and compile whatever information the agency seeks. The Company submits that this expansion of the subpoena power is beyond the contemplation of statute, and without precedent. The Company further submits that if agencies are to have the authority to issue interrogatories, under the guise of subpoenas, the deferential standard of review that applies in traditional subpoena cases should not be applicable, and that the district court should have the same supervisory authority as under the Federal Rules of Civil Procedure, to prevent oppression and abuse. This is an important question of federal law which merits review by this Court.

I.

THE EEOC'S STATUTORY SUBPOENA POWER IS LIMITED TO PRODUCTION OF EXISTING DOCUMENTS AND WITNESS TESTIMONY.

Section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9 makes applicable to EEOC investigations Section 11 of the National Labor Relations Act, 29 U.S.C. § 161(1). Section 11 of the NLRA provides that:

> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required.[6]

[6] In addition to the subpoena power, the EEOC also has an access power, pursuant to Section 709(a) of Title VII, 42 U.S.C. § 2000e-8(a) which provides that "In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." *EEOC v. Associated Dry*

This statutory language provides, through the use of the phrase "access to, for the purpose of examination, and right to copy," that the EEOC has the power to issue a subpoena *duces tecum* for any existing tangible evidence, including employment records, and any other tangible things that might be relevant.[7] With respect to evidence that does not exist in tangible form, and which must be obtained through witness testimony, the statutory language provides for subpoenas *ad testificandum,* compelling the attendance and testimony of witnesses. The statute does not give the EEOC the power to propound interrogatories, under which the respondent could be compelled to compile information from witness testimony. *Cf.* Fed. R. Civ. P., Rule 33. Thus, the clear implication is that the agency's sole means of obtaining witness testimony under the statute is to subpoena the witnesses themselves.[8]

Goods, 449 U.S. 590 (1981) (EEOC has two formal means of obtaining information when it investigates a charge). In this case, the EEOC proceeded under its subpoena power.

[7] The original language of Section 710(a) of Title VII authorized the EEOC to "require the production of documentary evidence." In 1972, the original language of Section 710 (a) was deleted, and replaced by the current Section 710, which makes applicable Section 11 of the National Labor Relations Act. The Court of Appeals concluded that by replacing the phrase "documentary evidence" with "any evidence" Congress gave the EEOC "authority to compel the company to produce evidence that does not presently exist in documentary form." (App. A, p. 10a). The Company does not take issue with that proposition, however, it submits that the means by which non-documentary evidence, that is, testimonial evidence, must be obtained is through "attendance and testimony of witnesses" as provided in Section 11 of the NLRA. There is no suggestion in the legislative history that by amending Title VII, Congress intended the EEOC to be able to require the respondent to interview witnesses and compile their testimony into a work product.

[8] The Court of Appeals also relied upon the language of Section 11 of the NLRA referring to "the production of any evidence in his [the respondent's] possession *or under his control.*" (App. A, p. 10a). (Emphasis by Court of Appeals). It

II.

THE COURT OF APPEALS' RULING IS A DEPARTURE FROM PRECEDENT.

It is well established that Section 11 of the NLRA gives the NLRB and EEOC broad subpoena powers. *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969) ("evidence" means books and records and other papers that will be of assistance to the Board); *EEOC v. Shell Oil,* 466 U.S. at 54, 104 S. Ct. at 1631 ("Since the enactment of Title VII, courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer.") In a number of cases, cited and relied upon by the Court of Appeals, courts have held that the EEOC may subpoena compilations.[9] *See EEOC v. Bay Shipbuilding Corp.,* 668 F.2d 304 (7th Cir. 1981); *New Orleans Public Service, Inc. v. Brown,* 507 F.2d 160 (5th Cir. 1975); *Circle K Corp. v. EEOC,* 501 F.2d 1052 (10th Cir. 1974); *EEOC v. United States Fidelity and Guaranty Co.,* 414 F. Supp. 227 (D. Md.), *aff'd,* 538 F.2d 324 (4th Cir. 1976). *But see U.S. Steel Corp. v. United States,* 6 Fair Empl. Prac. Cas. (BNA) 977 (W.D. Pa.), *aff'd mem.,* 487 F.2d 1396 (3d Cir. 1973) (Employer not required to compile data under statute which authorized EEOC only the power "to require production of documentary evidence."); *Joslin Dry Goods*

reasoned that the recollections of the Company's managers and employees are under its control and therefore reachable by subpoena. The phrase, "under its control," was quoted out of context by the Court of Appeals. The phrase "under its control" defines who shall have the right to petition to revoke a subpoena, it does not expand the scope of subpoena power. Moreover, even if recollections are under the control of the Company, the statutory way for the EEOC to obtain them under Section 11 is to subpoena witnesses.

[9] By contrast, the NLRB's use of subpoenas has been limited to production of existing, identifiable documents and attendance of witnesses. *See* 29 C.F.R. § 102.31; *NLRB Casehandling Manual* § 11776, ¶17,760 (CCH 1986).

Co. v. EEOC, 336 F. Supp. 941 (D. Colo. 1971), *aff'd in relevant part,* 483 F.2d 178 (10th Cir. 1973) (same); *H. Kessler Co. v. EEOC,* 53 F.R.D. 330 (N.D. Ga. 1971), *modified on other grounds,* 472 F.2d 1147 (5th Cir.) (en banc), *cert. denied,* 412 U.S. 939 (1973) (same); *Georgia Power Co. v. EEOC,* 295 F. Supp. 950 (N.D. Ga. 1968), *aff'd,* 412 F.2d 462 (5th Cir. 1969) (same). There was no indication, in any of the compilation cases cited by the Court of Appeals, that the information sought to be compiled was not readily available in existing personnel files. Indeed, to the extent that employers have claimed that the information sought to be produced or compiled was unavailable, the courts have uniformly held that employers need not produce what they do not possess. *EEOC v. Bay Shipbuilding,* 668 F.2d at 313 ("If a respondent lacks the information necessary to respond to part of a subpoena of course it would be excused pro tanto."); *EEOC v. Bethlehem Steel Corp.,* 765 F.2d 427, 431 (4th Cir. 1985) ("Bethlehem obviously cannot produce what it does not possess").

The Company submits that if information is located in existing files, the employer's burden should be satisfied by producing the files for the EEOC, which can make its own compilation. *See Georgia Power Co. v. EEOC,* 295 F. Supp. at 953-54 ("[T]he law does not compel the compilation or preparation of any research or summary by any employer, but only that documents in question be made available for examination and/or copying"). However, even accepting, for purposes of argument, the proposition that the EEOC may subpoena compilations from existing personnel documents, it is another thing entirely to subpoena a compilation of witness testimony. There is simply no

precedent for such use of administrative subpoenas under Section 11 of the National Labor Relations Act.[10]

III.

THERE IS A DIVISION OF AUTHORITY ON APPLICATION OF THE FEDERAL DISCOVERY RULES TO ADMINISTRATIVE SUBPOENAS.

In holding that the EEOC had authority to subpoena a compilation from witnesses' memories, the Court of Appeals relied by analogy on Rule 33 of the Federal Rules of Civil Procedure (Interrogatories to Parties). In the same opinion, however, the Court of Appeals questioned the Company's reliance on Rule 45(b) of the Federal Rules of Civil Procedure (Subpoenas). This internal inconsistency reflects a general division of authority on the extent to which federal discovery rules are applicable in enforcement of administrative subpoenas. A number of cases have held that Rule 45(b) is directly applicable to administrative subpoenas and that it gives the district courts authority to quash or modify an administrative subpoena if it is unreasonable or oppressive. *EEOC v. Packard Electric Division, General Motors Corp.*, 569 F.2d 315, 317 (5th Cir. 1978); *New Orleans Public Service, Inc. v. Brown*, 507 F.2d at 165. Others have held that Rule 45,

[10] The only case cited on this point by the Court of Appeals was *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953 (6th Cir. 1969). The case is inapposite. There, the NLRB sought to enforce an order requiring an employer to turn over information to its union in connection with its bargaining obligation. In answer to the company's suggestion that the information requested might not be contained in any existing document, the Court of Appeals held that the evidence should be compiled. A review of the request at issue reveals that it concerns current payroll information that one would expect to be available. Moreover, the case did not arise under Section 11 of the NLRA, it arose on an application to enforce compliance with a substantive NLRB rule interpreting the duty to bargain in good faith under Section 8(d) of the Act.

or other federal discovery rules are applicable by analogy. *United States v. Friedman,* 532 F.2d 928, 937 (3d Cir. 1976); *U.S. Steel Corp. v. United States,* 6 Fair Empl. Prac. Cas. (BNA) at 983-84; *H. Kessler & Co. v. EEOC,* 53 F.R.D. at 336; *Georgia Power Co. v. EEOC,* 295 F. Supp. at 953-54. Still other courts have held that neither Rule 45 nor other federal discovery rules have any application to enforcement of administrative subpoenas. *EEOC v. General Motors Acceptance Corp.,* 26 Empl. Prac. Dec. (CCH) ¶31,953 (E.D. Wis. 1981). *Accord FTC v. Turner,* 609 F.2d 743, 745 n.3 (5th Cir. 1980).

The Company submits that the EEOC's subpoena power does not include the power to propound interrogatories, and that the Court of Appeals' reliance on an analogy to Rule 33 is therefore misplaced. In 1972, when Congress amended Section 710 of Title VII, it was aware of the difference between subpoenas and interrogatories. If Congress wished to give the EEOC power to compel respondents to research witnesses' answers to questions and provide written responses, it could have given the EEOC express authority to propound interrogatories.

IV.

IF THE FEDERAL DISCOVERY RULES ARE APPLICABLE, THEN THE RESPONDENT SHOULD BE GIVEN THE BENEFIT, AS WELL AS THE BURDEN, OF THEM.

The Court of Appeals reasoned by analogy to Rule 33 of the Federal Rules of Civil Procedure that the EEOC had the power to issue a subpoena for what is, in essence, an answer to an interrogatory. Although the Court exposed the Company to the burden associated with Rule 33, it failed to give the Company the benefit of the protections associated with Rule 33, including the option to produce records in lieu of compilation and the district courts' broad

discretion to regulate discovery to prevent unfairness. Fed. R. Civ. P., Rule 26(b)(1). Instead, it applied the limited standard of review applicable to traditional subpoenas, in which subpoenas will be denied enforcement only if irrelevant under a broad interpretation of relevance or so burdensome as to seriously disrupt normal business operations. *United States v. Powell,* 379 U.S. 48 (1964); *United States v. Morton Salt Co.,* 338 U.S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946); *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501 (1943).

The Company submits that the EEOC cannot have it both ways. If it wishes to draw an analogy between subpoenas and federal discovery procedures, then it should draw a complete analogy, including the district court's supervisory power. Sound public policy, we submit, dictates that the further an agency departs from the traditional concept of a subpoena, the more review to which it should be subject. The traditional uses of subpoenas for production of documents and witnesses are subject to limited review because they pose little risk of oppression. Documents can be provided for copying by the agency at its own expense in such a manner as to minimize disruption of operations. There is little risk of oppression if personnel officials or managers are required to take some time off regular work to answer questions, pursuant to a subpoena for witness testimony.

By contrast, the potential for oppression arising from interrogatories was recognized by the Supreme Court when it promulgated the Federal Rules of Civil Procedure. Thus, the Rules permit the district courts to regulate the use of interrogatories, taking into account the burden and expense involved, the needs of the case, the limitations of the parties' resources, the importance of the issue to the case, and alternative sources of information. Fed. R. Civ. P., Rule 26(b)(1). In addition, the rules permit a party to

produce business records, in lieu of answering interrogatories, if the burden of compiling answers would be equal for the parties. Fed. R. Civ. P., Rule 33(c).[11]

V.

THIS CASE MERITS REVIEW.

The EEOC's practice of engaging in broad, statistical investigations has previously been mentioned by this Court. *EEOC v. Shell Oil, supra.* However, this Court has never considered the EEOC's practice of seeking to subpoena compilations from existing documents, or the further question presented herein, which concerns the EEOC's ability to subpoena a compilation of witness testimony. The decision of the Court of Appeals in this case, if permitted to stand, would give the EEOC authority to expand its investigative methods and to demand, by means of a subpoena *duces tecum,* answers to interrogatories. While the subject of the subpoena in this case relates to compilation of race identification from witness testimony, there is nothing in the Court of Appeals' reasoning that limits its application to such a compilation. Based on the Court of Appeals' decision, the EEOC, pursuant to its administrative subpoena powers, could, as part of an investigation, conduct an extensive pre-trial

[11] Had the federal discovery rules applied to this case, a different result should have been reached. The burden of inspecting retained photographic identification badges or interviewing managers and employees is no greater for the EEOC than for the Company; therefore, the Company should have been excused from those tasks. The Court of Appeals should have upheld the District Court's denial of an order requiring the Company to interview its managers and supervisors, on the grounds that the cost of such a project outweighed the value to the case of the compilation, which would be of no use in a statistical presentation, being tainted by an unascertainable rate of error.

discovery program, without being subject to any of the limitations set forth in the federal discovery rules. Whether the EEOC was granted such power by statute is, we submit, an important question that this Court should address.

CONCLUSION

For the foregoing reasons, Maryland Cup Corporation respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

In The
United States Court of Appeals
for the Fourth Circuit

Equal Employment Opportunity Commission
v.
Maryland Cup Corporation

No. 84-2128

Filed February 28, 1986

Appeal from the United States District Court
for the District of Maryland

Before Phillips and Sneeden, Circuit Judges,
And Butzner, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

The Equal Employment Opportunity Commission appeals the district court's order denying in part and granting in part enforcement of an administrative subpoena issued to Maryland Cup Corporation. We vacate the order and remand with instructions to enforce the subpoena subject to a slight modification.

On February 9, 1979, the EEOC served notice on Maryland Cup Corporation that a member of the commission had filed a charge of employment discrimination against the company, alleging that since 1974 Maryland Cup at five facilities had discriminated against blacks and women with respect to recruitment, hiring, training, job assignments, promotions, and salaries, in violation of

section 703(a) of Title VII, 42 U.S.C. section 2000e-2(a).[1] The EEOC sent Maryland Cup a questionnaire seeking information on the company's organization; information on its policies concerning recruitment, hiring, and promotion; and a list of employees hired, promoted, or fired at each facility for the years 1976 through 1979, indicating the race and sex of these individuals. The company did not produce this information but attempted to negotiate with the EEOC, requesting that the commission join it in an internal audit. After prolonged negotiations the company produced some of the requested documents. The company explained that the EEOC would have to pay the cost of copying the remainder of the documents requested. The company also refused to compile the list of employees.

On March 1, 1982, the EEOC served the subpoena at issue. Maryland Cup appealed the subpoena within the commission. As modified upon administrative appeal, the subpoena sought payroll and personnel summary cards for the years 1976 through 1980, containing information on each employee's race, sex, job classification, promotions, and salary. The subpoena also sought, for the same years, documents describing applicants' race, sex, testing and interviewing results, and referral sources. The subpoena demanded documents describing the company's training programs and the race, sex, and success of each trainee. Finally, the subpoena sought a list of all persons hired from 1976 through 1980, identified by sex and race.[2]

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[1] The EEOC is required to serve notice on an employer within 10 days of any charge of employment discrimination filed with the commission. Section 706(b), 42 U.S.C. § 2000e-5(b). Section 706(b) also requires the EEOC to investigate all charges, as does section 707(e), 42 U.S.C. § 2000e-6(e).

[2] The subpoena also demanded a tour of the facilities. The district court declined to enforce this aspect of the subpoena, without prejudice to the EEOC's right to renew the motion. The EEOC does not appeal this ruling.

Maryland Cup notified the EEOC that it would not produce the required documents unless the EEOC agreed to reimburse it for the costs of copying the documents. Alternatively, the company offered to allow the EEOC to bring its own copier to the company's facility to copy the documents. The company agreed to compile a list indicating race of employees for the years 1979 through 1981. The company refused to do so for the years 1976 through 1978, on the ground that this information was not documented and could be compiled only by examining photo identification badges still existing for about 40 percent of the former employees and by interviewing these employees' former supervisors and co-workers.

On July 26, 1984, the EEOC petitioned in district court for an order to show cause why the subpoena should not be enforced. At the hearing on the enforcement petition, the EEOC offered to copy the documents at its Baltimore office, one box at a time, to save the company the expense of making copies. The EEOC refused to compromise its demand for racial identification of persons employed from 1976 through 1978. The district court ruled that the EEOC lacked the authority to require the production of documents without reimbursing the company for copying costs. Accordingly, the court declined to enforce the portion of the subpoena requiring Maryland Cup to produce the documents. The court instead required the company only to make the documents available to the EEOC on the company's premises and to allow the EEOC to copy the documents there, at the EEOC's expense. Alternatively, the EEOC could select the documents to be copied by Maryland Cup and later reimburse the company at a negotiated price per page. The district court also ruled that the EEOC had no authority to require the company to conduct an internal investigation in order to respond to a subpoena. Consequently, the court declined to enforce the subpoena's requirement that Maryland Cup compile data

on the race and sex of persons employed by the company during the years 1976 through 1978.

The EEOC appeals both rulings. Because the district court's rulings were based on the legal conclusion that the EEOC lacked the authority to make the demands, we review the district court's order for errors of law. FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc); see Pullman-Standard v. Swint, 456 U.S. 273, 287, 28 FEP Cases 1073 (1982).

I

Administrative subpoenas are subject only to limited judicial review. See, e.g., NLRB v. G.H.R. Energy Corp., 707 F.2d 110, 113, 113 LRRM 3415 (5th Cir. 1982) (interpreting a statute granting a subpoena power identical to that of the EEOC). Upon petitioning for enforcement of an administrative subpoena, the issuing agency must make a threshold showing that the subpoena is within the agency's authority, that the agency has satisfied statutory requirements of due process, and that the information sought is relevant and material to the investigation. EEOC v. Children's Hospital Medical Center, 719 F.2d 1426, 1428, 33 FEP Cases 461 (9th Cir. 1983) (en banc); see United States v. Powell, 379 U.S. 48, 57-58 (1964). Once the agency makes this showing, the court must enforce the subpoena unless the party being investigated demonstrates that the subpoena is unduly burdensome. EEOC v. Children's Hospital Medical Center, 719 F.2d at 1428; EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 313, 27 FEP Cases 1377 (7th Cir. 1981); EEOC v. South Carolina National Bank, 562 F.2d 329, 332, 15 FEP Cases 1141 (4th Cir. 1977). Cf. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 217, 5 WH Cases 864 (1946).

The EEOC has met its threshold burden in this case. The EEOC is authorized to issue subpoenas by section 710

of Title VII, 42 U.S.C. section 2000e-9, incorporating by reference section 11 of the National Labor Relations Act, 29 U.S.C section 161.[3]

Section 11 of the National Labor Relations Act requires that the commission offer an internal appeal mechanism. The commission must revoke the subpoena "if in its opinion the evidence whose production is required does not relate to any matter under investigation" or "does not describe with sufficient particularity the evidence whose production is required." 29 U.S.C. § 161(1). The EEOC complied with these due process requirements, granting Maryland Cup an administrative appeal pursuant to its internal regulations. See 29 C.F.R. § 1601.16 (1984). The subpoena was modified slightly on appeal. The EEOC then properly sought the aid of the district court in enforcing the subpoena. See 29 U.S.C. § 161(2).

The evidence sought is described with sufficient particularity so that Maryland Cup can readily identify the evidence required. See NLRB v. G.H.R. Energy Corp., 707 F.2d 110, 114, 113 LRRM 3415 (5th Cir. 1982) (subpoena requiring personnel records of certain categories of employees held to be sufficiently particularized). Moreover, the evidence sought is relevant and material to the investigation. Documents containing information on the race, sex, and salaries of applicants, hirees, trainees, and promoted employees are relevant and material to the charge of race and sex discrimination in hiring, pro-

[3] Section 710 of Title VII, 42 U.S.C. § 2000e-9, provides: "For the purposes of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply." The referenced section grants the authority to issue "subpoenas requiring the attendance and testimony witnesses or the production of any evidence in such proceeding or investigation. . . ." 29 U.S.C. § 161(1). The EEOC's authority to conduct investigations is granted in sections 706(b) and 707(e) of Title VII, 42 U.S.C. §§ 2000e-5(b) and 2000e-6(e).

motions, training programs, and salaries. Although Maryland Cup argues that information on the race and sex of employees during the years 1976 through 1978 is "of limited relevance" because the charge was filed in 1979, such evidence is relevant and material to the question of whether the company engaged in a pattern of discrimination. Graniteville Co. v. EEOC, 438 F.2d 32, 42, 3 FEP Cases 155 (4th Cir. 1971). Moreover, the evidence is relevant to the issue of back pay liability. For a charge filed in 1979, the company could be liable for back pay from 1977. See Title VII, § 706(g), 42 U.S.C. § 2000e-5(g). See also EEOC v. Shell Oil Co., 466 U.S. 54, 68-69, 104 S. Ct. 1621, 1631, 34 FEP Cases 709 (1984) (noting with approval that courts have "afforded the Commission access to virtually any material that might cast light on the allegations against the employer").

Having found that the EEOC has met its threshold burden, we turn to Maryland Cup's argument that the subpoena should not be enforced because compliance would be burdensome. The company argues first that it cannot be required to produce the documents at the EEOC's office. Rather, the company contends that it need only provide access to the documents and allow the EEOC to copy them.

To the contrary, the statute grants the EEOC the right to demand the production of documents as well as the right to demand access to them. Section 11 of the National Labor Relations Act provides that "the production of . . . evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." 29 U.S.C. § 161(1); see also Cudahy Packing Co. v. Holland, 315 U.S. 357, 364 (1942) (dictum) (FTC subpoena may compel production of documents at distant places). The statute accordingly authorizes the EEOC to demand that the documents be delivered

across town from Maryland Cup's Baltimore office, the current location of the documents, to the EEOC's Baltimore office. See EEOC v. General Motors Acceptance Corp., 26 Empl. Prac. Dec. (CCH) ¶31,953, 40 FEP Cases 487 (E.D. Wis. 1981) (company required to deliver documents to EEOC office 1000 miles distant).

Maryland Cup next argues that the subpoena is burdensome in that it demands "a potentially unlimited number of documents." We find, however, that the EEOC is entitled to all documents relevant to the charge. EEOC v. Shell Oil Co., 104 S. Ct. at 1631. The possibility that the EEOC may at some time subpoena other documents does not affect the company's responsibility to produce documents now demanded.

Maryland Cup argues further that even if it is required to produce the documents for the EEOC, it is entitled to be reimbursed for the costs of copying the documents so that it may retain the originals.

The statute does not grant the party subject to a subpoena the right to reimbursement for costs of reproducing documents. 29 U.S.C. § 161; see FTC v. Texaco, Inc., 555 F.2d 862, 883 (D.C. Cir. 1977) (en banc) (holding that to impose reproduction costs on the FTC would derogate its power to issue administrative subpoenas). Some courts have conditioned enforcement of administrative subpoenas on the agency's payment of reproduction costs, if the party subject to the subpoena makes a showing that compliance with the subpoena would be unduly burdensome. The burden that an administrative subpoena is unduly burdensome is not easily met. See, e.g., FTC v. Rockefeller, 591 F.2d 182, 190 (2d Cir. 1979). The party subject to the subpoena must show that producing the documents would seriously disrupt its normal business operations. EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 313, 27 FEP Cases 1377 (7th Cir. 1981).

Maryland Cup has not made the required showing of serious disruption. The company merely makes the conclusory allegations that it needs constant access to all of the documents and that it fears that the EEOC will lose the documents. Such allegations do not constitute evidence that the company's normal operations will be seriously disrupted if it produces the documents. Indeed, the EEOC has offered to diminish the potential disruption by offering to copy the documents one box at a time at its own office. If Maryland Cup continues to fear the loss of the documents under this arrangement, it may assign an employee to accompany the documents while they are being copied.

Finally, the company argues that the subpoena is governed by Federal Rule of Civil Procedure 45(b), which provides that a court may quash or modify a subpoena duces tecum "if it is unreasonable and oppressive," or condition enforcement on the advancement of the costs of reproducing any subpoenaed documents.

The Advisory Committee's Notes to Rule 45 state that it does not apply to administrative subpoenas. The Notes specifically list section 11 of the National Labor Relations Act, 29 U.S.C section 161, as granting a subpoena power to which Rule 45 does not apply. Some courts have referred by analogy to Rule 45 to determine the appropriate standards for enforcing administrative subpoenas. See, e.g., New Orleans Public Service, Inc. v. Brown, 507 F.2d 160, 165, 9 FEP Cases 134 (5th Cir. 1975). Even if we were to apply Rule 45 by analogy, we would not be called upon to modify the subpoena, because Maryland Cup has not demonstrated that the subpoena is unreasonable and oppressive.

We conclude that the EEOC is entitled to enforcement of that portion of the subpoena requiring Maryland Cup to produce documents at the EEOC's office.

II

Maryland Cup also contends that the EEOC cannot require it to gather information about the race of former employees. The company's argument is threefold. First, the company argues that as a matter of law the EEOC cannot require the company to prepare documents but can only require the company to grant access to existing documents. Second, the company argues that even if the subpoena power extends to the preparation of documents, the company may only be required to compile data from existing documents. It cannot be required to gather information from photographs and interviews. Finally, the company contends that even if the EEOC may require the company to gather information, the requirement is unduly burdensome in this case.

The subpoena power of the EEOC is not limited to the production of documents already in existence. Rather, the enabling statute grants the EEOC broad authority to require "the production of any evidence." National Labor Relations Act § 11, 29 U.S.C. § 161(1). As applied to the EEOC, this phrase dates from the 1972 amendments to Title VII of the Civil Rights Act,[4] which strengthened the EEOC's enforcement power by giving the EEOC the authority to bring civil actions against employers and to intervene in private litigation. Title VII §§ 706(f)(1) and (2), 42 U.S.C. §§ 2000e-5(f)(1) and (2). Accordingly, the 1972 amendments also expanded the EEOC's investigative power. Prior to the 1972 amendments, the EEOC had the authority only to demand "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against. . . ." Section 709(a), 42 U.S.C. § 2000e-8(a) (1970). The terms "copy" and "examination" imply that the EEOC's right of

[4] Pub. L. 92-261, 86 Stat. 103 (1972).

access then extended only to existing documents. Similarly, section 710(a), 42 U.S.C. section 2000e-9(a) (1970), only authorized the EEOC to "require the production of documentary evidence."

In 1972 section 710(a) was deleted. It was replaced by a provision granting the EEOC the subpoena power enjoyed by the National Labor Relations Board. Section 710, 42 U.S.C. § 2000e-9. This subpoena authority extends generally to "any evidence." National Labor Relations Act section 11, 29 U.S.C. § 161(1).

Thus, in the 1972 amendments Congress extended the EEOC's investigative power, no longer confining the EEOC to the power to demand "documentary evidence" but granting it the power to subpoena "any evidence." We conclude that the EEOC has the authority to compel the company to produce evidence that does not presently exist in documentary form. See EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 313, 27 FEP Cases 1377 (7th Cir. 1981); EEOC v. New Orleans Public Service, Inc., 507 F.2d 160, 164-65, 9 FEP Cases 134 (5th Cir. 1975); Circle K Corp. v. EEOC, 501 F.2d 1052, 1054-55, 8 FEP Cases 758 (10th Cir. 1974); EEOC v. United States Fidelity and Guaranty Co., 414 F. Supp. 227, 242, 244, 13 FEP Cases 990 (D. Md.), aff'd, 538 F.2d 324, 13 FEP Cases 1005 (4th Cir. 1976) (table).

Maryland Cup's contention that it cannot be required to gather information misapprehends the scope of an administrative subpoena. Section 11 of the National Labor Relations Act provides that the subpoena power extends to "the production of any evidence in his [the respondent's] possession *or under his control.*" 29 U.S.C. § 161(1) (emphasis added).

We believe that this language includes the authority to require the respondent to compile evidence that is not in

documentary form. The Supreme Court explained in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216, 5 WH Cases 864 (1946), that an administrative agency's power to issue subpoenas, a power that is part of its "investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as . . . the court's in issuing other pre-trial orders for the discovery of evidence. . . ."

The fact that the information sought exists in the minds of the supervisors and workers, not in the minds of its senior managers, does not absolve the company from seeking out that information. To the contrary, all relevant information within the company's control is subject to the EEOC's subpoena power. Cf. Fed. R. Civ. P. 33(a) (respondent to interrogatory "shall furnish such information as is available to the party"); NLRB v. Rockwell-Standard Corp., 410 F.2d 953, 958, 71 LRRM 2328 (6th Cir. 1969).

Maryland Cup contends that compiling this evidence would be unduly burdensome because interviewing the supervisors and coworkers of former employees would cost an estimated $75,000.

Maryland Cup has not shown that the cost of gathering this information is unduly burdensome in the light of the company's normal operating costs. Cf. United States v. Davey, 543 F.2d 996, 1001 (2d Cir. 1976). Nor has the company shown that gathering the information would threaten its normal business operations. In the absence of such a threat, the subpoena is enforceable. EEOC v. A. E. Staley Manufacturing Co., 711 F.2d 780, 788, 32 FEP Cases 279 (7th Cir. 1983); EEOC v. Bay Shipbuilding Corp., 668 F.2d at 313; FTC v. Texaco, Inc., 555 F.2d at 882; see also EEOC v. United States Fidelity & Guaranty

Co., 414 F. Supp. 227, 244, 13 FEP Cases 990 (D. Md.), aff'd, 538 F.2d 324, 13 FEP Cases 1005 (4th Cir. 1976).

Thus, we conclude that the EEOC has the authority to require Maryland Cup to inspect photo identification badges and to interview supervisors and other employees in order to ascertain the race of former employees. Maryland Cup cannot be compelled to interview former supervisors who are no longer employed by the company, because the company no longer has access to or control over these persons. See EEOC v. Bethlehem Steel Corp., 765 F.2d 427, 430-31, 38 FEP Cases 345 (4th Cir. 1985). Nevertheless, the company must furnish the EEOC a list of employees and supervisors no longer with the company, along with their last known addresses and telephone numbers, so that the EEOC may contact these persons.

We vacate the order of the district court and remand with instructions to enforce the subpoena, except insofar as it requires the company to retrieve evidence from persons no longer under its control. On remand the district court should also set up a schedule for compliance with the subpoena, so that the production of documents and the gathering of information about the race and sex of the company's employees may proceed without delay.

Vacated and remanded with instructions.

Concurring Opinion

SNEEDEN, Circuit Judge, concurring: — I concur in the result reached by the panel on the facts of this case. However, I do not adopt certain broad language in the majority's opinion which is unnecessary to decide the case before us.

Specifically, I object to language on page eight of the opinion that states "Maryland Cup next argues that the

subpoena is burdensome in that it demands 'a potentially unlimited number of documents.' We find, however, that the EEOC is entitled to all documents relevant to the charge." Similarly, I do not approve of language on page thirteen of the opinion that states "all relevant information within the company's control is subject to the EEOC's subpoena power." Taken together, these statements may suggest an unlimited subpoena power for the EEOC and an invitation to conduct fishing expeditions. I am certain this result was not the intent of Congress.

Furthermore, the facts of this case indicate that it was not unduly burdensome for the employer to create evidence by interviewing present and former employees. However, I would limit this holding to the specific facts before us.

APPENDIX B

The United States District Court
For the District of Maryland

Civil Action No. R-84-2953

The Equal Employment Opportunity Commission,
Plaintiff,

v.

Maryland Cup Corporation,
Defendant.

September 10, 1984 — Baltimore, Maryland

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable Norman P. Ramsey at 10:00 a.m.

Appearances

For the Plaintiff
Gerald S. Kiel, Esq.
Lawrence D. Humphrey, Esq.

For the Defendant:
Bruce S. Harrison, Esq.
Eric Hemmendinger, Esq.
Stephen D. Shawe, Esq.

Reported by:
Linda R. Prince, Official Court Reporter

OPINION OF THE COURT

THE COURT: All right, gentlemen.

The issue before the Court is the application of the EEOC on order to show cause why an administrative subpoena which is therefore been issued should not be enforced.

The opposition which has been filed by the company and it has been fully briefed on both sides.

There is a wide divergence between EEOC's representative and the company's representative as respects who is responsible for the four-year plus delay in bringing this matter before the Court. The narrative of the two sides reflects an entirely different view of the proceedings which have occurred to date. The debate essentially distills itself, however, into three major and one minor inquiry, and they are:

EEOC's demand that Maryland Cup perform a reconstruction of racial identification of the employees in the 1976-1978 period; demand for plant tour; and the EEOC demands that Maryland Cup furnish copies, that is to say, pay the cost of reproduction of certain records which Maryland Cup says it has not only agreed to make available, but has in fact made available for extensive review; and that that review was abandoned by the EEOC after some three weeks of reviewing records, resulting in the attempt to force the company either to deliver the records to the hands of EEOC for copying, or to compel the company to reproduce and furnish copies at its own cost.

The surbordinate issue which is before the Court is the matter of a claimed exclusion of some 180 persons from the computer tapes, and that is only inferentially covered by page 2 of the reply brief of the EEOC where it gives us an example of documents and information which have not been supplied "missing information with respect to 180 mid-level managers and/or directors."

As to that issue, there has been no briefing. There has been no true address of the issue in the briefs of the parties which have been filed. It is a by-the-way issue. It is not a major issue. And it is not fully before me at this time. I will not address that matter. It may be that later it will become an issue which must be addressed, but I will

rule that that need not and must not be ruled on at this time without prejudice to the right of the EEOC to reraise the issue of the missing 180 employees at some time in the future, if that should become necessary.

As to the matter of causing Maryland Cup to furnish copies, that is to say pay for the cost of reproduction, I will not order the company's records turned over to the EEOC. I am perfectly aware of the confusion which occurs and results from masses of records being turned into government agencies and thereafter records relevant to court proceeding are not available when the Court proceeding is brought on for trial. It is not an infrequent occurrence that the very records which are the heart of a matter cannot be located or are not locatable as at the time when it is vitally important that they be had.

If I caused the company to deliver these to the EEOC, I would in effect force the company to recreate its own files by photocopying for its own protection everything which they turn over. I do not think that is what the investigation requires, and I do not think it appropriate.

I think what is appropriate is that there continues to be available to the EEOC and its investigators the records themselves with a right to either make copies at their own expense or to make an arrangement with the company to make copies at an agreed cost per copy. This will result in far more definitive selection of the documents to be reproduced than if the EEOC is simply in a position of making unbridled demands for unlimited numbers of documents; many, many of which probably would, in the last analysis, be of little or no use in connection with a particular investigation. Accordingly, as to the copies, I will not order delivery to EEOC.

I will order, however, that they remain available for inspection in an appropriate place at the company for

copying by EEOC, if that is their wish to do it on that site, or such alternative arrangements for reproduction at an agreed per-copy cost after the EEOC has made its selection of the documents which should and must be reproduced in order to accomplish an appropriate handling of the current investigation.

As to the demand for a plant tour, I am totally at a loss as to what a plant tour would do for this case, this investigation or this particular matter at this point in time. It may well be that subsequent hereto there will be a demonstrated need for a plant tour. I will therefore deny enforcement of that portion of the subpoena which requests a plant tour without prejudice to the right to renew it if cause can be shown why and if a legal basis for such a tour can be demonstrated by the EEOC in the future. I am not satisfied on the basis of the present record that the EEOC has either demonstrated the right to or the need for a plant tour.

Certainly if this case reaches litigation in the federal court, it will be a matter which can be treated under Civil Rule 34 in connection with inspection of time places, photographing and so on. But that would give the Court an opportunity to have a full explanation of why, how, when and by whom such a tour would be made, and the full right to the person being investigated to be certain that a protective order is entered which gives proper defense to the rights of the person being investigated.

As to the EEOC's demand that Maryland Cup perform a reconstruction of the racial identification of employees for the period between 1976 and 1978, I think this is a demand which need not be met by the company.

It is not the obligation of one under investigation to call witnesses in and do the preparation of work product in

connection with the statistical data which underlie the case.

If this is as vital as EEOC feels it is, then it is appropriate for them to expend their time, effort and energy in developing that data. But again, it is certainly not an issue where I can find myself unduly sympathetic to the EEOC's position, when in large part, the unavailability of documented racial data in the prior years arises out of regulation and/or directives issued by the Commission itself or by local Commission which forbade the retention of documents which showed racial identification. If they had existed, they could have been supplied. But to now ask the company to call in not only current employees but employees who have departed the company in the past and to interview them concerning recollection or recall as to the racial and sexual makeup of the various segments of the company's operation is to impose on an investigated company an obligation to commit itself on very imprecise and very suspect data to a position which can then be used in opposition to the company's right to be heard and to defend itself.

If the EEOC contends that this is necessary data, then they should spend their resources, their time and their personnel to develop it by subpoenas, if necessary, to various persons. And it is not illogical to start with one person, presumably a personnel director, in order to find the names of the various other persons who may very well be necessary to be subpoenaed in order to have access to what the EEOC now contends is this vital data.

In a word, there is a perfectly proper way to go about establishing this. It is not proper to demand by administrative subpoena that the company do the work of the EEOC for it. It is the proper purpose of the subpoena to cause the company to offer up and make available data

which it had, not to create and structure a whole case for the EEOC.

Accordingly, I will deny enforcement to that aspect of the subpoena which requires that the company perform a reconstruction of racial identification for the period '76 to '78. I will deny the demand for plant tour without prejudice to the right of EEOC to renew it.

And I will deny the right to have copies furnished at the company's expense with the understanding that the original data will be available for copying at the company's place of business or that the proper arrangements be made in connection with the reproduction so that the cost may be decided and copy costs established for reproduction by the company, to be paid, however, by the EEOC.

I think, gentlemen, as to the 180 names, that issue is not before me at this moment. I don't think it has been fully briefed, so I will not grant enforcement as to that without prejudice to the EEOC's right to continue and to later request that there be action taken in connection with the claimed missing 180 names.

In think, gentlemen, that disposes of the open issues in the case.

We will stand in recess.

THE CLERK: All rise, This Honorable Court stands in recess.

(Whereupon, the proceedings were adjourned.)

CERTIFICATE

I, Linda R. Prince, Official Reporter for the United States District Court for the District of Maryland,

appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and accurate transcript of the proceedings made in the aforementioned and numbered case on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

LINDA R. PRINCE,
Official Court Reporter.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

September 11, 1984

Isaac Joe, Jr., Esquire
Equal Employment Opportunity Commission
Baltimore District Office
109 Market Place, Suite 4000
Baltimore, Maryland 21202

Bruce S. Harrison, Esquire
Shawe & Rosenthal
Sun Life Building
Charles Center
Baltimore, Maryland 21201

RE: EEOC v. Maryland Cup Corp.,
Civil Action No. R-84-2953

Dear Counsel:

This letter will confirm the oral opinion I gave in the above-captioned matter at the hearing on September 10, 1984, concerning the show cause order to enforce a subpoena.

1. With regard to that portion of the subpoena which required that respondent perform a reconstruction of the

racial identification of employees for the period between 1976 and 1978, enforcement is DENIED.

2. With regard to that portion of the subpoena which required respondent to make its premises available for a general plant tour, the present record fails to demonstrate adequate cause and enforcement, therefore, is DENIED. The denial is without prejudice to applicant's right to demonstrate the necessity of, and legal authority for, a plant inspection of respondent's premises at a later time.

3. With regard to that portion of the subpoena which required the respondent to deliver its payroll records into the applicant's possession or to furnish copies of those records to the applicant at respondent's expense, enforcement is DENIED. Respondent will be required to make its records available to applicant on respondent's premises and to allow applicant to reproduce those records at its own expense on the respondent's premises, and to this extent enforcement is GRANTED.

4. With regard to applicant's assertion at oral argument that the subpoena should be enforced to require information concerning one hundred eighty employees whose records applicant asserts were deleted from a computer tape furnished by respondent, the Court concludes that this issue is neither raised nor briefed in the record and, accordingly, is not properly before the Court at this time. The Court, therefore, refuses to decide the issue without prejudice as to its determination if properly raised at a future date.

A copy of this letter to the Clerk of the Court will serve as the Court's ruling in this matter.

Very truly yours,

NORMAN P. RAMSEY,
United States District Judge.

NPR:mr

cc: Clerk of the Court

APPENDIX C

NATIONAL LABOR RELATIONS ACT

§ 161. Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

Documentary evidence; summoning witnesses and taking testimony

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any

Territory or possession thereof, at any designated place of hearing.

Court aid in compelling production of evidence and attendance of witnesses

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed. Pub. L. 91-452, Title II, § 234, Oct. 15, 1970, 84 Stat. 930.

(4) Process, service and return; fees of witnesses

Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the

United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Process, where served

(5) All process of any court to which application may be made under this subchapter may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

Information and assistance from departments

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing Discovery

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

APPENDIX E

FEDERAL RULES OF CIVIL PROCEDURE

Rule 33. Interrogatories to Parties

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

APPENDIX F

Federal Rules of Civil Procedure

Rule 45. Subpoena

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Supreme Court, U.S.
FILED
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CLERK

No. 85-1762

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARYLAND CUP CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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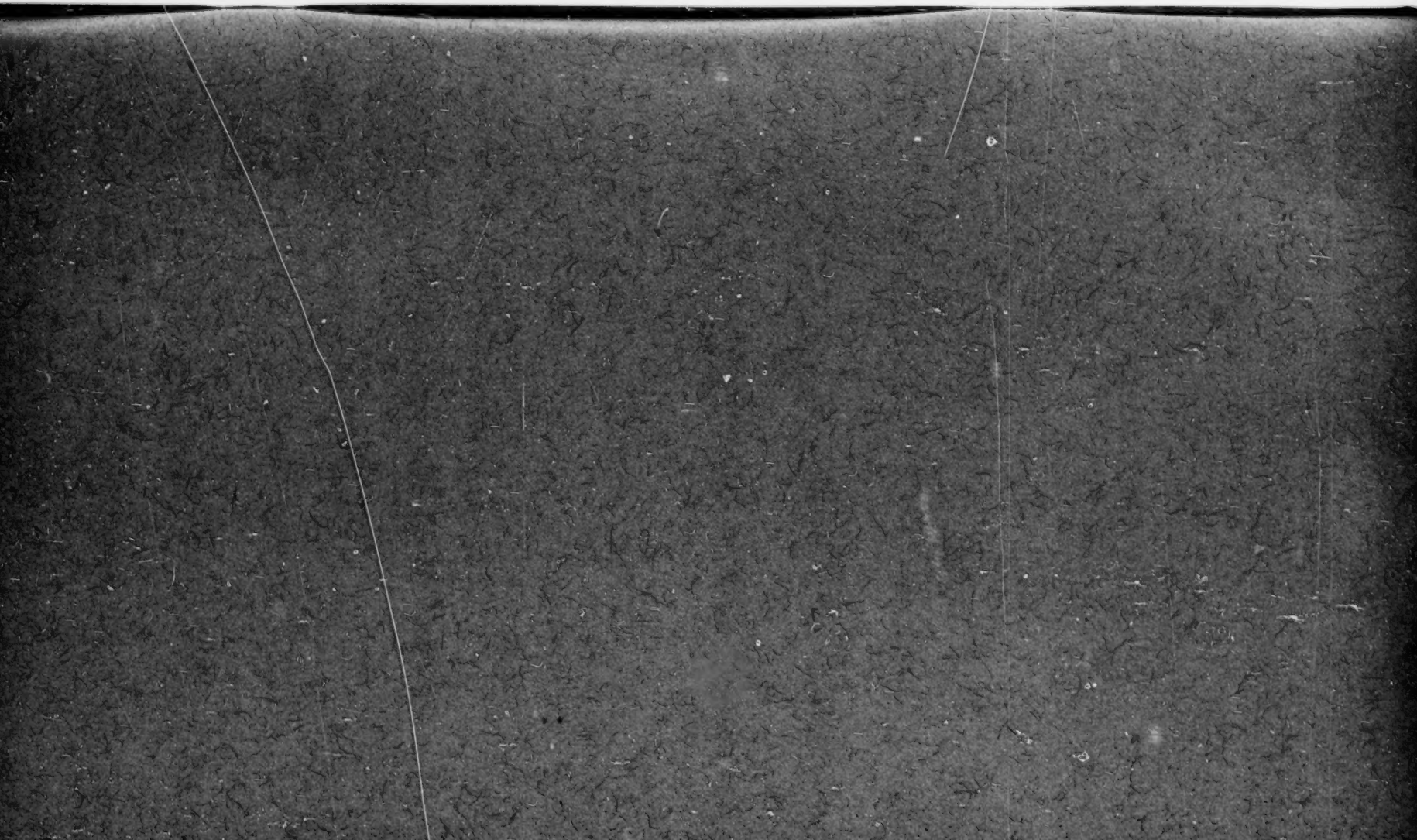

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission, as part of an investigation of a charge of discrimination, had authority to require an employer to compile information identifying its former employees by race.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1762

MARYLAND CUP CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 785 F.2d 471. The opinion of the district court (Pet. App. 14a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1986. The petition for a writ of certiorari was filed on April 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission (EEOC or Commission) brought this action to enforce an administrative subpoena seeking, inter alia, evidence from petitioner Maryland Cup Corporation regarding the race of its

employees in the 1976-1978 period. The United States District Court for the District of Maryland denied in relevant part the EEOC's request (Pet. App. 14a-21a); the court of appeals reversed (*id.* at 1a-13a).

1. In January 1979, the EEOC issued a charge pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6, alleging that petitioner had, at five of its facilities, engaged in a pattern of discrimination against its black and female employees with respect to recruitment, hiring, job assignments, training, promotions, and salaries (Pet. App. la-2a; C.A. App. 14-16). In furtherance of its investigation of the charge, the Commission issued a subpoena, part of which is now subject to challenge (Pet. App. 2a). As modified on administrative appeal, the subpoena seeks, inter alia, documents for the years 1976 through 1980 containing information about employees and applicants, including their race, sex, job classification, promotions, and salary (*ibid.*). Where documents showing the race of employees are unavailable, petitioner is required to reconstruct the information to the extent possible (C.A. App. 124).

Petitioner agreed to produce lists for 1979 through 1981 showing the race of employees but refused to compile race information for 1976 through 1978 (Pet. App. 3a), contending that it would be unduly burdensome to compile that information. Photo identification badges still exist for 40% of those employees; with respect to the remaining 60%, petitioner would have to interview its supervisors and coworkers to obtain the information (*ibid.*; C.A. App. 243-244).

2. The Commission brought this action to enforce the subpoena. The district court refused to enforce the demand for information identifying the race of former employees on the ground that "[i]t is not the obligation of one under

investigation to call witnesses in and do the preparation of work product in connection with the statistical data which underlie the case" (Pet. App. 17a-18a). The court suggested that the Commission obtain the information by issuing subpoenas requiring petitioner's personnel director and "various other persons" to testify as to the race of employees (*id.* at 18a; see also C.A. App. 295).[1]

3. The court of appeals reversed (Pet. App. la-13a). After recognizing that "the evidence sought is relevant and material to the investigation" (*id.* at 5a), the court held that "the EEOC has the authority to compel [petitioner] to produce evidence that does not presently exist in documentary form" (*id.* at l0a (citations omitted)). The court relied on Section 11(1) of the National Labor Relations Act, 29 U.S.C. 161(1) (incorporated into Title VII by 42 U.S.C. 2000e-9), which authorizes the EEOC to require " 'production of any evidence' "; the fact that the 1972 amendments to Title VII "expanded the EEOC's investigative power"; and case law upholding the Commission's authority to require compilation of information "that does not presently exist in documentary form" (Pet. App. 9a-l0a). The court of appeals concluded that petitioner "has not shown that the cost of gathering this information is unduly burdensome in the light of the company's normal operating costs. Nor has

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[1]Although petitioner provided some of the other evidence sought in the subpoena, it refused to reproduce the required documents unless the Commission agreed to reimburse the company for copying costs or to bring its own copying machine onto company premises (Pet. App. 3a). The district court held that the Commission must pay reproduction costs and cannot compel petitioner to produce documents at the Commission's office (*id.* at 16a-17a, 21a). The court of appeals reversed on the ground that petitioner failed to show that production of the documents at the Commission's office would pose an undue burden (*id.* at 7a-8a). Petitioner does not seek further review of this holding.

The EEOC did not appeal the district court's ruling that it was not entitled to a tour of petitioner's plant (Pet. App. 2a n.2, 17a, 21a).

the company shown that gathering the information would threaten its normal business operations" (*id.* at 11a (citation omitted)). Accordingly, the court enforced the subpoena except insofar as it required petitioner to interview former supervisors who are no longer in its employ and subject to its control (*id.* at 12a).[2]

ARGUMENT

The petition presents two questions: whether the EEOC has authority under Section 710 of Title VII, 42 U.S.C. 2000e-9, to subpoena the information at issue[3] and, if so, whether the subpoena should nonetheless have been invalidated under Fed. R. Civ. P. 33. But the subpoena in this case is valid under both Section 710 and Rule 33 and there is no decision of this Court or any other court of appeals to the contrary. Further review is not warranted.[4]

1. The court of appeals correctly held that the EEOC may compel petitioner to compile a list identifying its former employees by race. Petitioner does not challenge the court's holding that information showing the racial composition of petitioner's workforce is relevant to the pattern and

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[2]In a separate concurring opinion (Pet. App. 12a-13a), Judge Sneeden disagreed with "certain broad language in the majority's opinion," but concluded that "the facts of this case indicate that it was not unduly burdensome for the employer to create evidence by interviewing present and former employees" (*ibid.*).

[3]The first question presented (Pet. i) and the rest of the petition indicate that only the requirement that petitioner interview its employees—and not that it evaluate their badges—is now challenged.

[4]Neither question presented was squarely raised by petitioner in the court below. The gist of petitioner's brief in the court of appeals was not that compilations could not be subpoenaed, but only that making the compilation in this case would be unduly burdensome (Respondent's Br. 26-28). Petitioner did not mention Rule 33 in its brief to the court of appeals, and mentioned Rule 45 only cursorily (*id.* at 24). Although the court below did address the first issue, its discussion of the applicability of Rule 33 was limited to a "cf." citation. See page 11, *infra*.

practice charge under investigation.[5] Rather, petitioner contends that the only way the Commission may obtain this relevant information is by issuing a series of subpoenas compelling personnel officials, supervisors, and co-workers to testify as to the race of former employees. This position, if accepted, would be considerably more burdensome for both parties. The court of appeals sensibly rejected petitioner's arguments, and its decision is supported by the overwhelming weight of the case law, which has consistently upheld the Commission's authority to subpoena compilations of information, including identification of employees by race or sex.

The EEOC's broad authority to compel production of evidence derives from Section 710 of Title VII (42 U.S.C. 2000e-9), which incorporates by reference the statute authorizing the National Labor Relations Board's subpoena authority (§ 11(1), National Labor Relations Act, 29 U.S.C. 161(1)). Thus, EEOC has authority "to issue * * * subp[o]enas requiring the attendance and testimony of witnesses or the production of *any evidence*" (*ibid.* (emphasis added)).[6]

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[5]As the court of appeals held (Pet. App. 6a), evidence for the three years immediately preceding the 1979 charge is relevant to the issue of whether petitioner engaged in a pattern or practice of discrimination (see also *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 68-69 (1984); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 309-310 n.15 (1977)) and to determination of back pay liability, which could extend back two years before the filing of the charge (§ 706(g), 42 U.S.C. 2000e-5(g)).

[6]Contrary to petitioner's contention (Pet. 10 n.9), NLRB regulations do not indicate that its subpoenas must be limited to production of existing documents and attendance of witnesss. The *NLRB Casehandling Manual* (CCH) ¶ 17,760 (Oct. 1984) (emphasis in original), to which petitioner cites, provides:

> In all but the exceptional case, it is advisable to provide, *in the body of the subpoena*, for alternatives in lieu of physical production; e.g., that the party against whom the subpoena runs may furnish a signed statement setting forth the desired information, provided that pertinent records are made available to Board

The history of Congress's grants of subpoena authority to the EEOC clearly indicates that the Commission's current authority goes beyond the ability to issue the administrative equivalent of subpoenas *ad testificandum* and *duces tecum*. Prior to 1972, the Commission had authority only "to examine witnesses under oath and to require the production of documentary evidence." Pub. L. No. 88-352, § 710(a), 78 Stat. 264 (42 U.S.C. (1970 ed.) 2000e-9(a)).[7] This authority was further limited by a provision of the statute permitting district courts to modify or set aside the Commission's demand if it failed "to comply * * * with the limitations generally applicable to compulsory process" (42 U.S.C. (1970 ed.) 2000e-9(c)). The EEOC's current subpoena authority was included in the 1972 amendments to Title VII, as part of a major overhaul of the statute to increase the Commission's enforcement powers. Pub. L. No. 92-261, § 7, 86 Stat. 109 (codified at 42 U.S.C. 2000e-9); see generally *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 62-63 (1984); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359, 361-366 (1977). The expansive language allowing the agency to require "production of any evidence" and the elimination of the "limitations generally applicable to compulsory process" compel the conclusion that the Commission was no longer limited to examining witnesses and compelling production of existing documents. As the court of appeals

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agents for the purpose of checking the accuracy of the statement. See, *e.g.*, *Storkline Corp.* v. *NLRB*, 298 F.2d 276, 277 (5th Cir. 1962). The other NLRB source cited by petitioner, 29 C.F.R. 102.31, authorizes subpoenas "requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control."

[7]Petitioner's implication that the purpose of the 1972 amendment to Section 710 was to provide only for testimonial evidence (Pet. 9 n.7) is thus belied by the fact that the Commission had the power to obtain such evidence prior to the amendment.

recognized (Pet. App. 10a), the amendment was intended to free the Commission from unnecessary confinement and to broaden its authority to compel the production of " 'any evidence.' "

In contrast, petitioner seeks to impose new constraints that would require the Commission to take formal testimony under oath if evidence does not exist in documentary form. This would be a cumbersome and time-consuming process. Furthermore, petitioner cannot, of course, explain why the EEOC's request in this case is not a request for the production of evidence. That the evidence is not already compiled or written down does not mean it is nonexistent. And, of course, neither can petitioner explain why the evidence sought here, which is the most fundamental sort of statistic imaginable for an anti-discrimination action, is beyond the statute's contemplation. Cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973).

The courts of appeals have uniformly agreed with the court below that the Commission has authority to require an employer to compile information, including identification of employees by race.[8] The numerous cases enforcing

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[8]See, *e.g.*, *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981) (citations omitted) ("[t]his hoary point [that the EEOC has no authority to require compilation of information] has already been correctly rejected in other EEOC cases" (citations omitted)); *New Orleans Pub. Serv., Inc.* v. *Brown*, 507 F.2d 160, 164-165 (5th Cir. 1975); *Circle K Corp.* v. *EEOC*, 501 F.2d 1052, 1054-1055 (10th Cir. 1974); *Motorola, Inc.* v. *McLain*, 484 F.2d 1339, 1346 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974); *Sheet Metal Workers Int'l Ass'n Local 104* v. *EEOC*, 439 F.2d 237, 243 (9th Cir. 1971); *Graniteville Co. (Sibley Div.)* v. *EEOC*, 438 F.2d 32, 41-42 (4th Cir. 1971). See also *Valley Indus. Servs.* v. *EEOC*, 570 F. Supp. 902, 907 (N.D. Cal. 1983); *EEOC* v. *State Farm Mut. Auto. Ins. Co.*, 34 Fair Empl. Prac. Cas. (BNA) 1073, 1074-1075 (N.D. Cal. 1982); *Shell Oil Co.* v. *EEOC*, 523 F. Supp. 79, 89 (E.D. Mo. 1981), aff'd in relevant part, 676 F.2d 322, 326 (8th Cir. 1982), rev'd on other grounds, 466 U.S. 54 (1984); *EEOC* v. *University of Pittsburgh*, 487 F.Supp. 1071, 1077 (W.D. Pa. 1980),

subpoenas requesting identification of employees contain no indication that the information already existed in documentary form, and the very nature of a "compilation" request, of course, presumes that a new document is being created.[9] There is, furthermore, no valid reason for denying the Commission information essential to its investigation simply because the race of employees is recorded in the memories of supervisors and co-workers rather than in personnel files. Cf. *United States* v. *Euge*, 444 U.S. 707, 713 n.7 (1980) (citation omitted) ("Wigmore has identified the testimonial duty as including an obligation 'to disclose for the purpose of justice all that is in his control which can serve the ascertainment of the truth, [and] this duty includes * * * mental impressions preserved in his brain * * *.' ")[10]

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aff'd, 643 F.2d 983 (3d Cir.), cert. denied, 454 U.S. 880 (1981); *EEOC* v. *United States Fidelity & Guar. Co.*, 414 F. Supp. 227, 242-244 (D. Md.), aff'd, 538 F.2d 324 (4th Cir. 1976) (Table).

The four decisions—all at the district court level—cited by petitioner (Pet. 10-11) for the proposition that the EEOC lacks authority to compel compilations each involved demands for evidence issued before EEOC obtained subpoena authority in 1972. Even so, in one of the cases—*H. Kessler & Co.* v. *EEOC*, 53 F.R.D. 330 (N.D. Ga. 1971), aff'd, 468 F.2d 25 (1972), modified on other grounds, 472 F.2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973)—the court ordered the "new" compilation of a list of employees. The quotations (Pet. 11) from *EEOC* v. *Bay Shipbuilding Corp., supra*, and *EEOC* v. *Bethlehem Steel Corp.*, 765 F.2d 427 (4th Cir. 1985), are out of context; the full context supports the EEOC here.

[9]This construction of the EEOC's authority also accords with decisions construing the scope of the NLRB's power to issue subpoenas under 29 U.S.C. 161(1). This Court in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 768-769 (1969), construed the term "any evidence" to give the NLRB the power to subpoena a compiled list of names and addresses of employers eligible to vote in an election, though the Court did not explicitly address the compilation aspect of the subpoena.

[10]Petitioner states that Commission regulations discouraged employers from maintaining records showing the race of employees (Pet. 4 n.5). Current EEOC regulations, however, and the regulations in effect

As this Court has recognized, "it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired" (*EEOC* v. *Shell Oil Co.*, 466 U.S. at 69). The court of appeals correctly refused to impose constraints on the Commission's subpoena authority which would significantly hamper the Commission's ability to obtain the basic evidence necessary to determining whether petitioner has engaged in a pattern or practice of discrimination.

2. Petitioner's other contention is that the subpoena in this case should have been invalidated by application of the Federal Rules of Civil Procedure. This contention is without merit. The court of appeals expressly held, and Judge Sneeden emphasized in his concurrence, that the compilation required by the subpoena was not unduly burdensome (Pet. App. 8a, 11a, 13a); thus, it was within the bounds of Fed. R. Civ. P. 26(b)(1), 26(c), and 45(b) (see Pet. 12-14).[11] The court of appeals' conclusion with respect to this factual issue is not appropriate for review by this Court and, in any event, is correct. Moreover, the information sought by the Commission subpoena is actually more easily compiled by petitioner than by the EEOC, and thus Fed. R. Civ. P. 33(c) is inapplicable as well (see Pet. 13-15). If petitioner could not be asked to compile the information, the Commission would have to issue an administrative subpoena to each supervisor and co-worker to testify about the race of former

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during the time in question, merely recommend that permanent race identification data be kept separately from the employee's basic personnel file or other records (see 29 C.F.R. 1602.13).

[11]Corporations are of course required to compile lists routinely under the Federal Rules (see, *e.g.*, *Burns* v. *Thiokol Chem. Corp.*, 483 F.2d 300, 307 (5th Cir. 1973)); knowledge by a corporation's officers and employees is imputed to the corporation itself (see, *e.g.*, *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974)).

employees. There could be substantial delays during the administrative appeal of the subpoenas. Because petitioner has refused to allow EEOC access to its facilities or its employees, the Commission does not have the knowledge of company operations or the freedom of movement within a facility that company officials would have. The Commission would probably have to recall many employees with more delays. It clearly would be much easier, and much less intrusive, for petitioner to compile this information.

Of course, the Federal Rules of Civil Procedure do not by their terms apply to administrative proceedings (Fed. R. Civ. P. 1) and the statute that gives the EEOC subpoena authority does not incorporate the Federal Rules.[12] Moreover, the advisory committee note to Rule 45 expressly disclaims that rule's application to administrative subpoenas, which, depending on the authorizing statute, can be broader or narrower than conventional subpoenas.[13] Nonetheless, we agree that the proper scope of administrative subpoenas should not be considered in a vacuum, ignoring

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[12]As discussed at pages 6-7, *supra*, the 1972 amendments deleted an explicit incorporation of "limitations generally applicable to compulsory process."

[13]The advisory committee note to Rule 45, governing subpoenas, begins by stating:

> This rule applies to subpoenas *ad testificandum* and *duces tecum* issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States.

See also, *e.g.*, *FTC* v. *Turner*, 609 F.2d 743, 745 n.3 (5th Cir. 1980); *Porter* v. *Mueller*, 156 F.2d 278, 279-280 (3d Cir. 1946); *Bowles* v. *Bay of New York Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945).

the law and practice in other pre-trial discovery contexts. In the area of administrative subpoenas the courts of appeals routinely have, for instance, applied an "undue burden" limitation similar to—but less stringent than—that articulated in Fed. R. Civ. P. 26(b)(1), 26(c), and 45(b) with respect to civil discovery generally (Pet. App. 4a). Reference to other areas of practice is necessary to ensure that subpoena statutes are read neither too broadly nor too narrowly. Cf. *United States* v. *Euge*, 444 U.S. at 712-714; *EEOC* v. *Packard Elec. Div., General Motors Corp.*, 569 F.2d 315, 317, 319 (5th Cir. 1978); *United States* v. *Friedman*, 532 F.2d 928, 937 (3d Cir. 1976).[14] And because the EEOC's authority to issue administrative subpoenas allows it to make requests that bear some resemblance to interrogatories, the practicalities of Rule 33(c) are not irrelevant, as the court of appeals indicated by its "cf." citation to Rule 33 in support of its interpretation of 29 U.S.C. 161(1) (Pet. App. 11a). Nevertheless, although the Federal Rules do operate indirectly and by analogy in this way to guide the courts in reviewing administrative subpoenas, the fact remains that, in any event, the EEOC's subpoena in this case is entirely consistent with them. Thus, the scope of the Federal Rules analogy is not an appropriate issue for this Court's consideration.

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[14]Similarly, in the cases cited by petitioner (Pet. 12-13), the courts of appeals looked to Rule 45, but only as a convenient analogy to aid them in determining the standards applicable to enforcement of administrative subpoenas. See *EEOC* v. *Packard Elec. Div., General Motors Corp., supra*; *New Orleans Pub. Serv., Inc.* v. *Brown, supra*; *United States* v. *Friedman, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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